Supreme Court, U.S.
FILED
MAY 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1934

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ANNE DORE McLAUGHLIN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Respondent

vs.

GLASSBORO SERVICE ASSOCIATION, INC.,
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FREDERICK A. JACOB, ESQUIRE
Attorney for Petitioner
Jacob and Robinson
600 West Main Street
P.O. Box 429
Millville, New Jersey 08332
Linda T. Pirolli, Esquire, on the Petition

QUESTION PRESENTED FOR REVIEW

Whether an employer whose employees are otherwise paid minimum wage is in violation of 29 U.S.C. 201 et seq., the Fair Labor Standards Act, where those employees pay their own transportation expenses from the locus of their recruitment to the farms where they actually commence their employment?

TABLE OF CONTENTS

Question Presented for Review..... 1

Table of Contents..... 2

Opinions Below..... 4

Jurisdiction..... 5

Statutes and Federal Regulations Involved..... 6

Statement of the Case..... 15

Reasons for Granting the Writ..... 25

Conclusion..... 26

Appendix to Petition:

October 19, 1979 Opinion of United States District Court, District of New Jersey Granting Summary Judgment to Respondent... 1a

November 5, 1981 Consent Amendatory Order, United States District Court, District of New Jersey, following respondent's motion to hold petitioner in contempt..... 16a

August 25, 1983 Letter Opinion, United States District Court, District of New Jersey..... 22a

August 25, 1983, Order, United States District Court, District of New Jersey..... 36a

July 23, 1987 Letter Opinion, United States District, District of New Jersey, Upon respondent's second motion to hold petitioner in contempt..... 39a

September 8, 1987, Notice of Appeal from decision of United States District Court, for District of New Jersey, dated July 23, 1987 to United States Court of Appeals for the Third Circuit..... 68a

February 8, 1988, Judgment Order of United States Court of Appeals for the Third Circuit.... 70a

April 23, 1988 Consent Order, United States District Court, District of New Jersey..... 74a

OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court was entered on February 8, 1988 without opinion. The judgment affirmed was entered by way of Order of the United States District Court for the District of New Jersey dated July 23, 1987, (App. 70a). The Order of the District Court was accompanied by a Letter Opinion dated July 23, 1987, (App. 24a). The prior opinions of the United States District Court for the District of New Jersey are dated August 25, 1983 (unofficial opinion attached at App. 22a), November 5, 1981 (unofficial opinion attached at App. 16a), and December 4, 1979, unofficially reported as Marshall vs. Glassboro Service Association at 87 CHH Labor Cases para.

33,865 (D.N.J. 1979), aff.d 639 F. 2d 744 (3rd Cir. 1980), cert. den. 450 U.S. 1040 (1981). The opinion of the District Court in Marshall vs. Glassboro Service Association is attached (App. 1a).

JURISDICTION

The statutory basis of jurisdiction in this matter is as follows. The United States District Court for the District of New Jersey had jurisdiction of this action under 28 U.S.C. Sect. 1331 and 29 U.S.C. Sect. 217. The United States Court of Appeals for the Third Circuit had appellate jurisdiction of the matter pursuant to 28 U.S.C. Sect. 1291. The United States Supreme Court has jurisdiction of the matter pursuant to 28 U.S.C. Sect. 1254(1).

Judgment was entered in this matter on February 8, 1988. There was no application for re-hearing.

The Notice of Appeal which brought the matter before the United States Court of Appeals for the Third Circuit was filed on September 8, 1987.

STATUTES INVOLVED

United States Statutes

29 U.S.C. Sect. 203 (m)

"Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: Provided, that the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular

employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined

by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Federal Regulations

29 C.F.R. Sect. 531.31 - "Customarily" furnished.

The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where "customarily" furnished to the employee. Where such facilities are "furnished" to the

employee, it will be considered a sufficient satisfaction of this requirement if the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employees engaged in the same or similar trade, business, or occupation and the same or similar communities. See Walling vs. Alaska Pacific Consolidated Mining Co., 152 F. 2d 812 (C.A. 9), cert. denied, 327 U.S. 803; Southern Pacific Company vs. Joint Counsel (C.A. 9), 7 W.H. Cases 536. Facilities furnished in violation of any Federal, State, or local law, ordinance or prohibition will not be considered facilities "customarily" furnished.

29 C.F.R. Sect. 531.32 - "Other" facilities.

(a) "Other facilities" as used in this section, must be something like

board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, fire wood and lumber slabs), electricity, water, and gas furnished for the non-commercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the act and the transportation is not an incident of and necessary to the employment. (...)

(c) It should also be noted that Sect. 531.3(d)(1), the cost or furnishing "facilities" which are primarily for the benefit of convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. Items in addition to those set forth in Sect. 531.3 which have been held to be primarily for the benefit or convenience of the employer and are not therefore to be considered "facilities" within the meaning of Sect. 3(m) include: Safety caps, explosives, and miner's Lamps (in the mining industry); electric power (used for commercial production in the interest of the employer); company police and guard protection; taxes and insurance on the employer's buildings which are not used for lodgings furnished to the employee; "dues" to Chambers of Commerce and other

organizations used, for example, to repay subsidies given to the employer to locate his factory in a particular community; transportation charges where such transportation is an incident of and necessary to the employment (as in the case of a maintenance-of-way employees of a railroad); charges for rental of uniforms where the nature of the business requires the employee to wear a uniform; medical services and hospitalization which the employer is bound to furnish under workman's compensations acts, or similar Federal, State or local law. On the other hand, meals are always regarded as primarily for the benefit and convenience of the employee. For a discussion of reimbursement for expenses such as "supper money", "travel expenses", etc., see Section 778.217 of this chapter.

29 C.F.R. 778.217 - Reimbursement for

expenses.

(a) General Rule. Where an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, Sect. 7(e)(2) is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the work week.

(b) Illustrations. (...)

(3) The actual or reasonably approximate amount expended by an employee who is traveling "over the road" on his employer's business for transportation (whether by private car

or common carrier)...

(5) The actual or reasonably approximate amount expended by an employee as temporary excess home-to-work travel expenses incurred (i) because the employer has moved the plant to another town before the employee has had the opportunity to find living quarters at the new location or (ii) because the employee, on a particular occasion, is required to report for work at a place other than his regular workplace.

STATEMENT OF THE CASE

This appeal concerns the payment by migrant laborers recruited by appellant of their own transportation expenses from Puerto Rico to New Jersey farms. Glassboro Service Association, Inc. (Glassboro), a New Jersey corporation, is an association of farmers registered as a farm labor contractor. Glassboro's function is to recruit migrant laborers and to provide them with employment at various member farms throughout each farming season. It performs this function pursuant to written agreement with the Commonwealth of Puerto Rico. For doing so, it receives a percentage of each worker's wages from the employing farm as compensation.

A major problem in the recruitment of migrant laborers is defection of the laborers from their employment prior to completing the season, or even prior to

commencing actual employment at a farm in the mainland United States. A substantial percentage of workers use the recruitment process as a means of inexpensive travel to the mainland United States and then depart, leaving Glassboro without employees for its member farms and therefore without compensation for recruiting the workers and arranging for their transportation.

To attempt to minimize the percentage of recruits who fail to commence employment or work through the season, Glassboro has, over the years, attempted to develop a system of recruitment providing workers with incentive to remain employed throughout the season. This was originally accomplished, between 1974 and 1976, through the air and bus transportation of workers by Glassboro from Puerto Rico to New York and later New Jersey, and

compulsory deduction of a portion of travel expenses from workers' weekly pay checks throughout the season. At the conclusion of the season, every worker who has remained employed at his or her assigned farm received a rebate of the entire transportation expense, together with a return ticket to Puerto Rico.[1]

The practices described were the subject of a complaint filed by the

---

[1] The hourly wages for each laborer were as follows:

1974 - $2.13
1975 - $2.30
1976 - $2.40
1977 - $2.65
1978 - $2.65
1979 - $2.90
1980 - $3.10
1981 - $3.35
1982 - $3.35
1983 - $3.35
1984 - $3.35
1985 - $3.35
1986 - $3.50
1987 - $3.50
1988 - $3.65

The Department of Labor contended that the deduction and refund of transportation expenses reduced each worker's wage below the statutory minimum.

Department of Labor on February 22, 1978, alleging violations of 29 U.S.C. 201 et seq., the Fair Labor Standards Act. There was no trial: the Court entered summary judgment for the Department of Labor as to compulsory payment by the workers of their transportation costs, but denied summary judgment for the Department of Labor as to damages. In an attempt to comply with the order of the Court while still motivating workers to complete the season, in 1980 and 1981 Glassboro once again recruited workers, and to a portion of these it loaned transportation expenses which the workers voluntarily agreed to repay to Glassboro. And once again, every worker who completed the season was rebated the transportation expense and provided with free return transportation to Puerto Rico. This practice elicited a motion for contempt

against Glassboro from the Department of Labor culminating in a contempt order, again without a hearing, enjoining a loan repayment method of transportation of workers to the mainland.

Glassboro thereafter redoubled its effort to arrive, with the Department of Labor, at a means of recruitment and transportation that would effectuate its goal of motivating workers to complete the season without violation of 29 U.S.C. 201 et seq., the Fair Labor Standards Act. Before a consensus with the Department of Labor had been achieved, however, a new season had been commenced in 1982. At this time, Glassboro's agreement with the Commonwealth of Puerto Rico provided that all workers were independently to pay their own transportation expenses to member farms. Any worker who completed the season would receive rebate of the expense together

with return transportation to Puerto Rico. Between 1982 and 1985, workers paid their own transportation expenses from Puerto Rico to New Jersey farms, received minimum wage of $3.35 per hour for as long as they worked, and were rebated transportation costs to New Jersey together with return transportation to Puerto Rico if they completed the season.

Glassboro's practice of independent worker payment of transportation expense elicited a second contempt motion by the Department of Labor directed at Glassboro for the years 1982 through 1985 when workers were paid minimum wage. Commencing in 1986, workers were paid in excess of minimum wage and the Department of Labor has acknowledged that the difference more than compensates for payment of transportation expenses and therefore

does not give rise to even putative reduction of wages below the statutory minimum (Brief of Department of Labor, in the United States Court of Appeals for the Third Circuit p. 4, n. 4). The District Court once again denied a hearing and held Glassboro in contempt, and on appeal the Third Circuit affirmed without opinion.

It is clear from the procedural history in this matter that the District Court interprets relevant law to require an employer to furnish all transportation expenses of any employee from point of recruitment to the place where the employee actually commences employment. It is Glassboro's contention that 29 C.F.R. 531 clarifies 29 U.S.C. 201 to require payment of transportation expenses only after the employee commences employment and for transportation necessitated in the course

of employment. The District Court in its order for summary judgment for the Department of Labor and in its first and second contempt orders, flatly rejected this contention; the Third Circuit has affirmed that interpretation of the law. This question is at the core of the present application.

The Fair Labor Standards Act, 29 U.S.C. 201 et seq., sets forth the minimum wage to be paid to agricultural workers, at 29 U.S.C. 206(a)(5), but does not address the question of which expenses incidental to their employment may be set off against wages. 29 C.F.R. 531.1 et seq., clarifies the issue by classifying these incidental expenses, known as facilities, into two categories: (a) facilities primarily for the benefit of the employee, the reasonable cost of which may be considered as part of wages, and (b)

facilities primarily for the benefit of the employer, the reasonable cost of which may not be counted against the employee's wages, 29 C.F.R. 531.3(d). Lists of facilities considered primarily for the benefit of the employer are set forth at 29 C.F.R. 531.3(d)(2) and 29 C.F.R. 531.32 (which specifically discusses transportation expenses "incident of and necessary to employment"). Moreover, 29 C.F.R. 778.217 clarifies what expenses incurred by an employee must be reimbursed to the employee; these are expenses incurred by the employee "on behalf of" or "for the convenience of" the employer and include transportation expenses incurred while "traveling on the employer's business".

In its Administrative Opinion No. 262, the Department of Labor has taken the position that "the cost of transporting employees to and from the

point of hire (is) a cost to be borne by the employer, and not the employee, as a cost incidental to the employer's recruitment program". Petitioner contends that the position taken by the Department of Labor conflicts with the interpretation of the Fair Labor Standards Act, provided by Federal Regulations cited above, specifically 29 C.F.R. 531.32 and 29 C.F.R. 778.217. Because Glassboro does not benefit at all from the presence of the employee in New Jersey until the employee actually, willingly, commences employment, it is submitted that the expenses of the transportation of the employee to the mainland United States from Puerto Rico are not primarily for the benefit of the employer and therefore constitute a facility primarily for the benefit of the employee.

REASONS FOR GRANTING THE WRIT

It is submitted that the issue of an employer's liability for a minimum wage employee's pre-employment transportation expenses has far-reaching consequences. There are thousands of migrant laborers employed throughout the United States seasonally at minimum wage. This case presents a question which has never before been squarely addressed in a published opinion and which substantially affects the means by which migrant laborers in particular, and all minimum wage workers generally, may be recruited and transported to their place of employment. An opinion in this case will also affect the circumstances under which an employer must furnish other "facilities" such as clothing or equipment free of charge to minimum wage employees, thereby rendering certain types of employment

more or less palatable to employers or to employees.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the opinions, judgment and orders of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

FREDERICK A. JACOB
Jacob and Robinson
600 West Main Street
P.O. Box 429
Millville, N.J. 08332
(609) 825-0700
Counsel for Petitioner

87-1934 (2)

No._____

Supreme Court, U.S.
FILED
MAY 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

Ann Dore McLaughlin, Secretary
of Labor, United States Department
of Labor,
Respondent,

vs.

Glassboro Service Association, Inc.,
Petitioner

On Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Third Circuit

Appendix to Petition for Writ of Certiorari

Frederick A. Jacob, Esquire
Jacob & Robinson
600 West Main Street
P.O. Box 429
Millville, NJ 08332-0429
(609)825-0700

TABLE OF CONTENTS

Page

October 19, 1979 Opinion of United States District Court, District of New Jersey Granting Summary Judgment to Respondent..... 1a

November 5, 1981 Consent Amendatory Order, United States District Court, District of New Jersey, following respondent's motion to hold petitioner in contempt..... 16a

August 25, 1983 Letter Opinion, United States District Court, District of New Jersey..... 22a

August 25, 1983, Order, United States District Court, District of New Jersey..... 36a

July 23, 1987 Letter Opinion, United States District, District of New Jersey, upon respondent's second motion to hold petitioner in contempt..... 39a

September 8, 1987, Notice of Appeal from decision of United States District Court, for District of New Jersey, dated July 23, 1987 to United States Court of Appeals for the Third Circuit..... 68a

February 8, 1988, Judgment Order of United States Court of Appeals for the Third Circuit..... 70a

April 23, 1988 Consent Order,
United States District Court,
District of New Jersey..... 74a

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY, OCTOBER 19, 1979, reprinted at 87 CCH LC, para 33, 865 (1979)

[Statement of Case]

Gerry, J:. Plaintiff here charges the defendant with violating the provisions of Section 16 and 15(a)(2) of the Fair Labor Standards Act by paying its employees who are engaged in commerce or in the production of goods for commerce or who are employed in an enterprise engaged in commerce or in the production of goods for commerce at rates less than the minimum wage prescribed by the Act. Glassboro Services Association, Inc. is a New Jersey corporation which consists of 299 member farms throughout the eastern and southeastern state. Its purpose is to arrange for the hire of Puerto Rican migrant farmers for its member farms. Pursuant to this purpose Glassboro renegotiated for its members in

agreement with the Commonwealth of Puerto Rico.

Apparently this agreement between Glassboro and the Commonwealth provides that Glassboro will loan the cost of air fare for transportation to the member farms to the migrant workers. The workers repay Glassboro according to a schedule set in the agreement. If the workers complete his term of hire with Glassboro, Glassboro gives him, one, the cost of air fare paid back by the worker already to the member farm and two, a ticket home to Puerto Rico or its cash equivalent. However, if the worker doesn't complete his term of hire, he winds up having to pay for his air fare to the farm; Glassboro never reimburses him. In the latter case, the loan repayments sometimes have the effect of bringing the employee's weekly wage below the Federal minimum wage.

The plaintiff only addresses itself to this latter situation and claims that the practice of deducting loan repayments from wages is a violation of the Fair Labor Standards Act insofar as it results in employees receiving less than the minimum wage. The defendant doesn't seem to contest this question of law insofar as my ability is concerned, but argues that other benefits Glassboro's member farms provide to the employees should be included in computation of the minimum wage and, in any case, only nominal damages should be awarded. Glassboro also contests the Labor Department's manner of computing minimum wage deficiencies. The plaintiff in reply, contends that as a matter of law the other benefits cannot be included in the computations. Plaintiff also argues that this is not a proper case for the award of nominal damages.

In the instant case, the parties seem to agree that the defendant deducted the cost of air fare from the wages of its employees and that, if certain other benefits were not considered, such deductions resulted in the employee earning less than the applicable Federal minimum wage.

This Court is faced with two initial legal issues. One, whether the Fair Labor Standards Act and the regulations issued thereunder, prohibit the deductions from an employee's wages of transportation costs to and from the point of hire, which deduction reduces the wages of the employee below the minimum wage required by this Act.

Second issue whether the Fair Labor Standards Act and the regulations issued thereunder allow an employee to offset benefits provided in the form of housing and utilities against the minimum

required to be paid to employees where the collective bargaining agreement states that such benefits are to be provided "at no cost to the worker."

[FLSA Provisions, Interpretations]

Section 6 of the Act provides for the period involved in this litigation, 1975 through 1977 as follows with respect to the statutory minimum wages to be paid all agricultural employees, and I quote:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, wages at the following rates and thereafter the wage rates are stated for various periods.

Section 3(m) sets forth the statutory definition of wage and provides in parts that seem to me that are applicable and pertinent here, "wage paid to any employee includes the reasonable cost as determined by the Secretary of Lábor, to the employer of furnishing such employee with board,

lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees provided that the cost of board, lodging or other facilities shall not be included as a part of the wage paid to any employee to the extent it is included therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee."

Thus, reading Sections 6 and 3(m) together the minimum wage must be paid in cash except insofar as payment of wages in board, lodging or other facilities is permitted by the Act. This interpretation is under 29 CFR Section 531.27(a). Moreover, 29 USC Section 211 authorizes the Wage and Hour Administration to administer and enforce the Act and his or her interpretations of the Act are entitled to great weight by the Court. The main issue here is

whether the transportation charges assessed by the defendant on its agricultural employees can be included int he computations of the employees' minimum wages as the cost of furnishing "facilities"--and that word is used in the Act--to the employee.

29 CFR 531.3(d) sets forth the relevant test for determining whether the furnishing of facilities can be included in the computation of the employees' wages: whether the furnished facility is primarily for the benefit or convenience of the employer. In 29 CFR Section 531.32(c) the Administration charges are to be considered primarily for the employer's benefit where such transportation is an incident of that employment.

[Transportation Cost as Wages]

Keeping in mind the weight and consideration this Court is required to

give to the Administration's interpretation of the Act, the Court notes that on previous occasions the Wage-Hour Administration has ruled that transportation expenses from the point of hire to the work site could not be considered in the determination of whether a minimum wage has been paid because such transportation was an incident of the employer's recruitment program. Opinion letter of Wage-Hour Administration Number 1139 (WH-92) December 10, 1970 and March, 1969 to June, 1973 CCH Labor law Reporter Transfer Binder, Wage-Hour Administration ruling Section 30,709. And that the cost of transportation to and from a work site was normally regarded as part of the employer's recruitment cost and could not be deducted from the employees' wages if the result would be to reduce the wages below the minimum wage required by

the Act. In the instant case, the defendant has not challenged the reasoning of the Administration in the above cited cases.

This Court finds that the cost of transporting workers to the point of hire cannot properly be included in the computations of the employees' minimum wages as the cost of furnishing facilities to the employees and that is permitted otherwise under the Act.

[Housing and Utilities as Wages]

The defendant urges the Court to allow it to offset benefits provided to employees in the form of housing and utilities against the minimum wage required to be paid to employees. Section 3(m) of the Act clearly allows such an offset subject to the proviso, and I quote:

> Again, provided that the cost of board lodging or other facilities shall not be included as part of the wage paid

> to any employee to the extent it is excluded therefrom under the terms of a bona fide collective bargaining agreement applicable to the particular employee.

In the present case it is undisputed that the contract negotiated by the Commonwealth of Puerto Rico and the defendant is in the nature of a collective bargaining agreement as it governs the hours, wages, terms and conditions of employment of the Puerto Rican migrant employee workers brought by the defendant to work in the northeast. The question this is whether those "facilities" are excluded from the wages paid to the employees under that agreement.

The agreement at issue in Article 8 provides that the defendant is to provide lodging at no cost to the workers and either meals to be paid for by the worker or at the rate of $3.40 or $3.50 per day or cooking and eating

facilities at no cost to the worker. The defendants would have the Court now allow the defendants to offset the cost of such facilities against the minimum wage due the employees even though the defendant previously agreed to furnish these facilities at no cost to the worker.

In an analogous case the Wage-Hour Administration stated that such phrases as "fee of cost, without charge" and "free of charge" are construed to mean excluded from wages under an agreement which specified that meals would be furnished free of charge and the employer could not take a wage credit for items excluded from wages. The reasoning of the Wage-Hour Administration is persuasive. To allow the employer a wage credit for facilities excluded from wages and to allow this credit is to result in the employee receiving less than the

minimum wage would necessarily violate the terms of Section 3(m) which forbids the inclusion as part of the minimum wage paid to any employee, the cost of board, lodging or other facilities which have been, as here, excluded from wages under the terms of a collective bargaining agreement.

The Court finds, therefore, that the defendant cannot offset the value of the benefits provided in the form of housing and utilities against the wage required to be paid its employees if such offset would result in the employee receiving in cash less than the minimum wage.

[Nominal Damages Caused]

Finally, the defendant urges this Court to award only nominal damages for its violation of this Act. the defendant cites one unreported case from the Cumberland County district Court in

support of this proposition. That case apparently was a breach of contract case in which the plaintiff was a migrant worker. The policies underlying the Fair Labor Standards Act were not considered in that case and thus the analogy between that case and this one at bar appears somewhat strained.

In the instant case the defendant argues that to restrain the withholding of wages to its employees would amount to a penalty or an unjust enrichment. However, in order for the defendant to release the wages earned by its employees simply restores to the employees that to which they were rightfully entitled. In fact, the defendant it would seem would be unjustly enriched if it were allowed to retain improperly those portions of the employees' wages that have been retained. However, it appears to the Court that the parties disagree as to the

amount of damages and the proper method to calculate such damages and the records from which such damages should be calculated, as Mr. Jacob pointed out.

Therefore, the Court grants partial summary judgment for the plaintiff as to the illegalities of defendant's practice of deducting from employees' wages, transportation costs to and from the point of hire, which deduction reduces the wages of the employee below the minimum wage required to be paid by the Act.

Further, the Court finds as a matter of law that the defendant is not entitled to an offset for the "facilities", that is, lodging and utilities provided to its employees because such benefits were to be excluded from the wages under the agreement between the defendant and the Commonwealth of Puerto Rico.

The Court' feels that there is no genuine issue as to material fact and that the plaintiff is entitled to this remedy as a matter of law. Finally, because there are issues of fact to be resolved with respect to the extent of damages and the entitlement thereto, the Court denies summary judgment on the issues of damages and it will be reserved for resolution at the appropriate time by the trier of facts.

November 5, 1981 Consent Amendatory Order, United States District Court, District of New Jersey, Granting Summary judgment to respondent.

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,
Plaintiff

vs.

GLASSBORO SERVICE ASSOCIATION, INC.,
Defendant.

Civil Action File No.: 78-0377
(Gerry, J.)

Consent Amendatory Order

Plaintiff having filed a Petition for Prosecution of Defendant, Glassboro Service Association, Inc., for Civil Contempt of Court, having filed a Motion to Hold Defendant in Civil Contempt of this Court by reason of its failure and refusal to obey the Order of this Court granting Plaintiff partial summary judgment entered on December 4, 1979 and filed on December 5, 1979, and the parties having appeared before the Court on October 16, 1981, and having consented to the entry of this consent Amendatory

Order nunc pro tunc to and including the date of the Order granting Plaintiff partial summary judgment entered on December 4, 1979 and filed on December 5, 1979, and the Plaintiff having hereby withdrawn his Petition for Prosecution of Defendant for Civil Contempt and his Motion to Hold Defendant in Civil Contempt without prejudice to renew, the Court's Order granting Plaintiff partial summary judgment is hereby amended to read as follows:

ORDERED, ADJUDGED AND DECREED that defendant, its member farmers, their agents, servants, employees, and those persons in active concert or participation with them are permanently enjoined and restrained nunc pro tunc to and including the date of the Order granting plaintiff partial summary judgment entered on December 4, 1979 and filed on December 5, 1979 from violating

Sections 6 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended [52 Stat. 1060; 29 U.S.C. 219 et seq. (hereinafter, "the Act")] in any of the following manners:

(1) (Glassboro shall not) (sic--faulty photocopy received from Clerk) pay its employees who are engaged in commerce or in the production of goods for commerce, or who are employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act as aforesaid, at rates less than the minimum wage prescribed therein;

(2) Defendant shall not deduct the cost of transporting workers from the point of recruitment to the point of hire from the minimum wages due its employees under the Act. Defendant shall not include the computations of its employees' minimum wages, as the cost of furnishing facilities to its employees, the cost of

transporting workers from the point of recruitment to the point of hire;

(3) Defendant shall not offset the value of the benefits provided by it pursuant to its contract with its employees in the form of housing, utilities and meals against the minimum wage required to be paid to its employees if such offset would result in the employee receiving in cash less than the minimum wage prescribed by the Act;

(4) Defendant shall not fail to comply with the provisions of 29 Code of Federal Regulations Part 531.35 which provides that "[w]hether in cash or in facilities, 'wages' cannot be considered to have been paid by the employer unless they are paid finally and unconditionally or 'free and clear.' The wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the

employer's benefit the whole or part of the wage delivered to the employee. This is true whether the 'kick-back' is made in cash or in other than cash...."

(5) Defendant shall not advance transportation costs to its employees for transportation from their point of recruitment to their point of hire and then seek to secure a voluntary repayment, "payback" or "kick-back" to it by these employees where the result is to bring such employees below the minimum wage prescribed by the Act for the workweeks in question;

(6) Defendant shall not apply any outstanding wage checks due to its employees to any transportation cost indebtedness where the result is to bring such employees below the minimum wage prescribed by the Act for the workweeks in question.

Dated: November 4, 1981

/s/John F. Gerry
United States District Judge

The undersigned attorneys hereby consent to the entry of this Order.

T. Timothy Ryan, Jr.,
Solicitor of Labor

Francis V. LaRuffa
Regional Solicitor
By: /s/Manuel delValle
Attorney U. S. Department of Labor

Attorney for Defendant
Glassboro Services Assoc., Inc.
/s/Frederick A. Jacob, Esq.

August 25, 1983 Letter Opinion of John F. Gerry, District of New Jersey, to counsel for petitioner and respondent

RE: Ray Marshall, Secretary of Labor
vs. Glassboro Service Association, Inc. - Civil Action No. 78-377

Dear Counsel:

The Labor Department filed its complaint in the instant case on or about February 1978, alleging a pattern or practice by defendant of violations of the minimum wage standards of the Fair Labor Standards Act, 29 U.S.C. 201 et seq.

On December 5, 1979, this court granted plaintiff's motion for partial summary judgment on the question of liability. Specifically, the court ruled that deductions from migrant farmworkers' wages to recompense the employer for the workers' transportation costs violated the Fair Labor Standards Act (FLSA) to the extent that such deductions

effectively lowered wages below the federally-mandated minimum wage. The Third Circuit Court of Appeals thereafter affirmed. Marshall v. Glassboro Service Ass'n., 639 F.2d 774 (3d Cir. 1979) (J.O.). The court enjoined such deductions.

In October 1981, the Government applied to the court for an order holding defendant in contempt of the court's December 1979 ruling. According to the Department of Labor, Glassboro had implemented a system of so-called voluntary paybacks for plane fare under which workers who failed to complete their contracts either paid over, or suffered wage deductions for, the amount of their plane fare.

In November 1981, the parties agreed to a "consent amendatory order" prohibiting, inter alia, Glassboro from implementing or continuing the voluntary

payback scheme. The order applied nunc pro tunc to December 5, 1979, the date of the court's order granting the Government summary judgment on the liability question. Thus, the consent amendatory order effectively established defendant's liability during the calendar years 1980 and 1981 for unpaid minimum wages arising from workers' payment of their air fares.

Since entry of the consent decree, the parties have undertaken, with gratifying cooperativeness, extensive discovery to determine the amount of underpayments to Glassboro workers. Those underpayments principally, if not wholly, arose from assessment of airplane fares against the workers' wages.

In the process of discovery, the Government claims to have uncovered an additional set of "transportation" deductions imposed upon the workers in the years 1980-1981 -- the cost of bus

fare from one or another airport to the Glassboro labor camp. The Government now seeks an order holding the imposition of such costs violative of the consent decree.

In addition, the Government petitions for an award of prejudgment interest upon the judgment for damages the court will presently enter.

Bus-(Ground Transportation) Fare.

According to the Government, Glassboro and its member-growers during the calendar years 1980 and 1981 required that their migrant workers pay Glassboro for bus fare from their point of arrival to the Glassboro camp. The Government moves that the court hold these deductions violative of the Consent Amendatory Order entered November 4, 1981.

According to Glassboro, the relevant portions of the consent order

provide as follows:

> (5) Defendant shall not advance transportation costs to its employees for transportation from their point of recruitment to their point of hire and then seek to secure a voluntary repayment, "payback" or "kick-back" to it by these employees where the result is to bring such employees below the minimum wage prescribed by the Act for the workweeks in question;
>
> (6) Defendant shall not apply any outstanding wage checks due to its employees to any transportation cost indebtedness where the result is to bring such employees below the minimum wage prescribed by the Act for the workweeks in question.

According to defendant, Glassboro secured payment from the migrant workers for bus fare from one or another airport to the Glassboro camp principally by exacting payment before the workers boarded the bus. Some workers, defendant admits, did not pay the fare until they disembarked at the Glassboro camp. An exceptional few did not pay at all, and

these suffered deductions from their pay by the farmer-members of the Glassboro Service Association.

Defendant concedes that deductions for bus fare assessed after the worker was assigned to a farm would and did violate the consent decree, paragraphs 5 and 6. Defendant further specifies that Glassboro has already included these deductions in its calculation of already established liability. But defendant argues that bus fare payments by workers before assignment to a particular farm do not violate paragraphs 5 and 6, because the migrant worker's payment is made before he begins working. As such, it cannot constitute a deduction from wages, since the worker has earned no wages at the time he makes the payment.

Defendant's argument focuses solely upon paragraphs 5 and 6 of the decree. That focus ignores the breadth of the

terms of the decree, and substitutes artificial distinctions for a practical view of the economic realities of the worker-contractor relationship.

Neither plaintiff nor defendant have emphasized a subparagraph (2) of the November 1981 consent decree. That paragraph forbids defendant to "deduct the cost of transporting workers from the point of recruitment to the point of hire from the minimum wages due its employees under the Act".

Perhaps more important, the decree continues in the following manner:

> Defendant shall not include in the computations of its employees' minimum wages, as the cost of furnishing facilities to its employees, the cost of transporting workers from the point of recruitment to the point of hire.

Consent Amendatory Order, subparagraph (2).

Regardless of when the worker pays for his fare, the court thinks that the

quoted portion of the consent order places the burden of that cost upon the employer. The decree forbids the employer from including transportation costs from the point of recruitment--here Puerto Rico -- to the point of hire -- the farm -- as a part of the employer's minimum wage payment to the worker. But to pay workers the minimum wage, and at the same time to require them to pay their bus fare from the airport to the camp, effectively does render the cost of transport a part of the wage payment.

Thus, the court holds that to the extent that a worker's payment of his ground transportation reduced the amount of money he ultimately earned below the minimum wage, that payment violated the consent amendatory order of November 4, 1981.

The parties have submitted this

matter on the papers, consenting to the court's adjudication without a hearing.

The Government's damages figures are based in part upon a finding that the payment of bus transportation fares by the workers violated the decree -- the defendant's figures are premised on the absence of a violation.

Therefore, the court will accept the Government's figures and enter judgment in that amount.

Interest.

The FLSA does not explicitly authorize the assessment of interest on an award of backwages. See McClanahan v. Matthews, 440 F.2d 320, 324 (6th Cir. 1971). The court may, however, in the exercise of its inherent equitable powers, assess such interest against a violator of the Act.

The Government urges that employees victimized by sub-minimum wage payments

are entitled to an interest award, to make them whole for the defendant's wrongful withholding of moneys due the workers.

The award of interest falls within the court's discretion. A number of factors should inform the exercise of that discretion: the presence or absence of good faith on the employer's part, Hodgson v. American Can Co., 440 F.2d 916 (8th Cir. 1971); the magnitude of the violations, Marshall v. Burger King, 509 F. Supp. 353, 356 (E.D. N.Y. 1981); and perhaps the plausibility of the reasons for the violation, or when an employer runs afoul of a particularly complex regulation. See Marshall v. Duncan, 480 F. Supp. 62, 64 (E.D. Tenn. 1979). Assessment of interest, thus, involves an equitable analysis of the particular facts of each case. Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 663 (4th

Cir. 1969).

In the instant case, the court has already ruled that Glassboro's actions were not willful. Donovan v. Glassboro Service Association, Civil No. 78-0377, letter opinion, October 4, 1982 (Gerry, J.). The court's decision does not delineate exactly what an absence of willfulness means in the instant case, for it recognized the existence of three distinct definitions of willfulness. But the court held that, even under the least demanding standard -- knowledge of the likelihood of the application of the statute to the offensive conduct -- the record in this case did not suggest the presence of a willful violation:

> Whatever test this court applies, it would place a strained construction on the available record to find that Glassboro Services Association willfully violated the FLSA.
>
> The case presented a somewhat novel legal issue. More important,

> the question of liability for transportation (deductions) below the minimum wage was complicated in the instant case by the varying lengths of service of many of Glassboro's workers. It appears, for example, that the workers who finished out their contracts may not have suffered deductions for transportation expenses. See Affid. of Garafalo, para. 3, 4 (filed June 11, 1982), whereas other workers who did not work the full term of a contract did suffer such deductions.
>
> Moreover, the record suggests that Glassboro conducted the challenged practice over a substantial number of years, included in the contract a provision spelling out the transportation deductions and did not receive objection from one or another governmental entities which were familiar with the contract. Affid. of Garafalo, para. 5.

Id., letter opinion, October 4, 1982, p. 2.

The court's finding on the absence of willfulness represents an equitable factor counseling against the assessment of interest.

The record suggests another factor favorable to the employer -- Glassboro

and its members contracted with the Puerto Rican Government to provide free housing for the workers. The Act suggests that employers may legally deduct housing costs from the minimum wage payments to workers, under certain circumstances which the court held not present in the instant case. FLSA 3(m). Glassboro bargained away its right to take such deductions; therefore, the court held as a matter of law that the provision of free housing could not counterbalance illicit deductions for transportation costs. Nonetheless, the employer might reasonably have considered the provision of free housing as an offset against impermissible assessments against the wage.

Finally, Glassboro argues with some justification that the record strongly suggests that the Association did not have the use of a large part of the

moneys deducted for payment of transportation costs. That is, it appears that Glassboro expended such moneys to transport the workers. Therefore, at least in one light, it does not appear that Glassboro created a pool of money effectively 'loaned' to it by underpaid workers -- money which Glassboro might have used as capital, for example. Rather, the money covered transportation expenses.

The record does not thus present a compelling case for the assessment of interest. The court believes the equities recommend against such an award and so will decline to assess interest against Glassboro.

The court will enter the accompanying order.

/s/ John F. Gerry, U.S.D.J.

August 25, 1983 Order

U.S. District Court, District of N.J.

RAY MARSHALL, Secretary of Labor, Plaintiff,

v.

GLASSBORO SERVICE ASSOCIATION, INC., Defendant.

Civil Action No. 78-377

ORDER

This matter having come before the court upon the motion of the Department of Labor, Manuel Del Valle, Esquire, appearing; and

The parties having agreed to submit the matter upon the papers without

hearing or oral argument; and

The court having considered the submissions of the parties;

It is this 25th day of August, 1983, hereby ORDERED that:

1. Pursuant to the Consent Order In Re: Unpaid Minimum Backwages, Dec. 14, 1982, Paragraphs 2 and 3, defendant shall be liable for reductions of the minimum wage resulting from farmworkers' payment of bus fare transportation costs;

2. Defendants shall not be liable for interest upon the judgment in this case;

3. The total backwages for the 1980 and 1981 calendar years shall be, and hereby are determined to be, $88,807.67.

It is FURTHER ORDERED that, pursuant to the terms of this order and the terms of the consent order of Dec. 14, 1982, that final judgment for unpaid

minimum backwages shall be and hereby is entered against the defendant in the amount of $294,622.34.

/s/ JOHN F. GERRY, U.S.D.J.

July 23, 1987 Letter Opinion

U.S. District Court, District of N.J.

Upon Respondent's Second Motion to

Hold Petitioner in Contempt

U.S. District Court

District of N.J.

U.S. Court House

Camden, NJ 08101-0588

LETTER OPINION

Filed July 23, 1987

Patricia M. Rodenhausen, Esquire

Regional Solicitor

Leslie Paul Brody, Esquire

U.S. Department of Labor

1515 Broadway, Room 3555

New York, N.Y. 10036

Frederick A. Jacob, Esquire

600 W. Main Street

Millville, N.J. 08332

Re: William E. Brock, Secretary of Labor, U.S. Dept. of Labor vs. Glassboro Service Association, Inc.
Civil Action No. 78-0377

Dear Litigants:

Presently before the court is the plaintiff's application to hold the defendant in contempt. This matter is before the court more than four years following the entry of a judgment and final order. The case began with the filing of a complaint in June, 1978 charging defendant, a farm labor contractor, with violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. sect. 201 et seq. The pertinent factual background follows.

As part of its operations, defendant employs migrant farm workers

from Puerto Rico to work on its member farms. Defendant recruits many of its migrant employees in Puerto Rico and arranges their transportation from the Puerto Rican point of recruitment to the New Jersey point of hire. At the inception of this lawsuit, the defendant paid the transportation costs of its employees but then deducted those costs from the workers' paychecks. This deduction frequently resulted in reducing the workers' effective rate of pay to less then the minimum wage. (Workers who completed their contract period of work were later refunded the money deducted and given a return ticket to Puerto Rico.)

On December 4, 1979, we granted plaintiff's motion for partial summary judgment, (as to liability). Construing sect. 3(m) of the FLSA, 29 U.S.C. sect. 203(m), we found that the transportation

charges incurred by the employer "are to be considered primarily for the employer's benefit where such transportation is an incident of employment." (emphasis added). 29 C.F.R. sects. 531.2(d) and 531.32(C), see also Wage-Hour Administration Op. Letter #1139 (WH-92) December 10, 1970. Accordingly, we entered an order stating that,

> (1) Defendant shall not contrary to section 6 of the Act fail to pay its employees who are engaged in commerce or in the production of goods for commerce . . . at rates less than the minimum wage prescribed therein.
>
> (2) Defendant shall not deduct the cost of transporting workers from the point of recruitment to the point of hire from the minimum wages due its employees under the Act. Defendant shall not include in the computations of its employees' minimum wages, as the cost of furnishing facilities to its employees, the cost of transporting workers from the point of recruitment to the point of hire.

(We also barred the defendant from

taking an offset of workers' wages for the value of food and lodging provided the workers. This finding is not at issue presently.) We denied a motion for reconsideration February 2, 1980. The Third Circuit affirmed us without opinion October 18, 1980 (639 F.2d 774) and the Supreme Court denied certiorari April 6, 1981 (450 U.S. 1040).

In August, 1981, plaintiff brought an application to hold defendant in contempt. At the time defendant had stopped its practice of deducting transportation costs from workers' pay and was instead advancing the costs to the workers and then requesting "voluntary paybacks" of those advances. Plaintiff submitted evidence that the paybacks were not voluntary at all and the parties agreed to a Consent Amendatory Order to resolve the dispute. The order, entered November 5, 1981,

included verbatim paragraphs (1) and (2) of the December 4, 1979 order and added the following at paragraphs 4, 5, and 6:

> (4) Defendant shall not fail to comply with the provisions of 29 C.F.R. Part 531.35 which provides that "[w]hether in cash or in facilities, 'wages' cannot considered to have been paid by the employer unless they are paid finally and un conditionally or 'free and clear.' The wage requirements of the Act will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the 'kick-back' is made in cash or in other than cash. . . ."
>
> (5) Defendant shall not advance transportation costs to its employees for transportation from their point of recruitment to their point of hire and then seek to secure a voluntary repayment, 'payback' or 'kick-back' to it by these employees where the result is to bring such employees below the minimum wage. . .
>
> (6) Defendant shall not apply any outstanding wage checks due to its employees to any transportation cost indebtedness where the result is to bring such employees below the minimum wage. . .

Shortly thereafter the parties also

entered a consent order regarding discovery, the purpose of which was the calculation of damages from the unlawful "voluntary paybacks." See Order of January 4, 1982.

The calculation of damages was, it seems clear from this record, a task of mortifying detail and scope. In the course of this calculation, which took over a year and a half, the government discovered another transportation cost which had been deducted from workers' wages. The defendant required its employees to pay the cost of inland bus transportation from the airport (typically Newark) to the farm labor camps. At times the workers paid bus fare before taking the trip from airport to farm, at other times paid upon disembarking the bus and at other times never paid at all. The cost of the trip for the last group of workers was then

deducted from their pay. Defendant conceded that deductions for bus fare assessed after the worker was assigned to a farm violated the November 5, 1981 consent decree. But defendant maintained that payments made before assignment to a particular farm did not violate the consent decree because the worker's payment is made before he begins working and thus cannot constitute a deduction of wages.

We rejected this argument flatly. Focusing on paragraph (2) of the consent order ("Defendant shall not include . . . the cost of transporting workers from the point of recruitment to the point of hire.") we held,

> Regardless of when the worker pays for his fare, the court thinks that the quoted portion of the consent order places the burden of that cost upon the employer. The decree forbids the employer from including transportation costs from the point of recruitment -- here Puerto Rico -- to the point of hire -- the farm -- as

> a part of the employer's minimum wage payment to the worker. But to pay workers the minimum wage, and at the same time to require them to pay their bus fare from the airport to the camp, effectively does render the cost of transport a part of the wage payment.

To hold otherwise, we stated, would "substitute[] artificial distinctions for a practical view of the economic realities of the worker-contractor relationship." Letter Opinion of August 25, 1983 at 3. We entered final judgment in the matter at that time, directing the defendant to pay some $294.000 in back wages.

Plaintiff's instant contempt application asserts that defendant continues to flout this court's orders through a contract provision which requires the migrants to pay their own transportation expenses. The provision provides, in relevant part:

Article 9 - Transportation

A. The Association shall arrange transportation for the worker from the point of departure in Puerto Rico to the work location. The worker shall be responsible for the actual cost of the air flight . . . (emphasis added).

The worker shall be responsible for the cost of inland transportation from the point of arrival on the mainland to the first living quarters . . . (emphasis added).

Defendant does not deny that this is the contract provision in force, since August of 1983, nor does it deny that by virtue of paying their own transportation the workers' wages are at times reduced to below the minimum wage. It contends that as a legal matter the court has not forbidden this transportation arrangement and that a contempt proceeding is an inappropriate mechanism for adjudicating its liability under this arrangement.

By way of remedy plaintiff seeks, in addition to an order barring the above-described practice, an order

mandating the payment of back-wages owed as a result of contempt from August 25, 1983 to the present.

Analysis

Before proceeding to an analysis of the contempt application itself, we must deal with one jurisdictional issue. In February of 1984, defendant sought protection form its creditors under Chapter 11 of The Bankruptcy Code. The filing of defendant's bankruptcy petition operated as an automatic stay of the commencing or continuing of other actions or proceedings not exempted from the stay against the debtor/defendant. Thus we reach the question of whether this petition must be stayed under the Bankruptcy Code, 11 U.S.C. sect. 362(a). We find that they stay does not affect the matter before us.

While the effect of the Bankruptcy Code's automatic stay is broad indeed,

the statute itself provides for exemptions from the stay. The instant application is so exempted. In particular, 11 U.S.C. sect. 362(5) provides in pertinent part:

> The filing of a petition under sects. 301, 302 or 303 of this title does not operate as a stay . . .
>
> (4) Under subsection (a) (1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
>
> (5) Under subsection (a) (2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

As the plaintiff correctly points out, there has generally been no stay of the enforcement of federal labor legislation. E.g. Ahrens Aircraft, Inc. v. NLRB, 703 F.2d 23, 24 (1st Cir. 1983) (automatic stay did not preclude enforcement of NLRB back pay order). Defendant does not

contest this and we thus find that this action is not stayed by the Bankruptcy Code.

We turn now to the merits of this application. Plaintiff's argument has two parts. First, he argues that the requirement that the migrant workers bear their air transportation costs constitutes contempt of this court's orders. Second, he asserts that the requirement that the migrant workers pay their own inland ground transportation costs constitutes contempt of this court's orders. We will address both arguments at once.

Plaintiff's argument as to both the air and ground transportation costs is simple. He asserts that while the form of the payments made by the workers has changed, the resulting effect is the same and is barred by this court's orders. For instance, plaintiff argues that this

payment by the workers is neither a "deduction" nor a "kick-back" however because the workers must pay their own transportation their wages are not paid "finally and unconditionally." Also, plaintiff notes that whenever and whomever the workers pay the costs of transportation those payments benefit the defendant, who depends upon the arrival of workers from Puerto Rico to provide farm labor. Finally, like the supposed "voluntary paybacks" we enjoined in 1981, these paybacks are not voluntary but are rather a condition of employment because workers who choose not to pay them simply do not work. Similarly, those who pay the transportation costs but choose to leave their jobs before completing their contracts do not get reimbursed for transportation.

Regarding the payment of inland transportation, plaintiff points out that

our August 25, 1983 letter opinion spoke to the legality of the workers paying bus fare before boarding the bus. We found that,

> Regardless of when the worker pays for his fare, the court thinks that the quoted portion of the consent order places the burden of that cost upon the employer. . . .
>
> . . . to pay workers the minimum wage, and at the same time to require them to pay their bus fare from the airport to the camp, effectively does render the cost of transport a part of the wage payment.

Letter Opinion at 3. Thus, plaintiff argues, as to the payment for ground transportation, this court's orders were crystal clear and the defendant's present activity constitutes contempt of those orders from the time of the opinions to the present.

Defendant has several responses. The most basic of these is the contention that neither this court nor the FLSA requires this defendant or any other

employer to pay the costs of its employees' transportation to the work site. For instance, defendant notes that a large fraction -- nearly 40% in 1986 -- of its workers simply show up at its farm labor camp. These workers sign a contract which does not include the transportation clause as to air fare from Puerto Rico or inland bus fare. (If these workers complete their contract, they are given air fare to return to Puerto Rico). Plaintiff has not argued that defendant must reimburse these people for their transportation costs; indeed, such people were specifically excluded from back pay calculations under this court's order of December 30, 1981. Counsel for defendant attests that he never believed this court prohibited workers from paying for their own transportation. (Jacob Affidavit at Paragraph 13). Thus, the issue of

whether a worker may pay his own transportation has not been before this court and must be litigated not in a contempt proceeding but a new lawsuit. Defendant requests, at the least, an opportunity to present evidence which will show inter alia, that the transportation from Puerto Rico to this country actually benefits not the employer but the worker, that the Commonwealth of Puerto Rico (which negotiates contracts on behalf of the migrant workers) considers the transportation to the mainland to be to the benefit of workers, and that even when defendant does not advance transportation costs to its workers it is able to hire an adequate number of workers.

On the issue of whether our 1983 letter opinion forbids the defendant's requiring its employees from paying their

own bus fare, defendant asserts that our opinion constitutes mere dicta on the present issue because no order encompassing the opinion was entered and because neither party contended that paragraph (2) of our 1981 amended order applied to the bus fare issue. Thus, defendant contends, even though we found that paragraph (2) did apply the basis for our decision was not properly before the court. (Brief at 2-3; Jacob Affidavit at Paragraph 18-20)

Finally, defendant asserts that it should not be held in contempt because it has attempted in good faith to comply with this court's orders. In February, 1984, defendant sought the Department of Labor's ("DOL") approval of a new arrangement regarding transportation costs. Defendant notes that the DOL did not respond to this proposal for more than a year and a half, finally rejecting

the proposal in October, 1985. In addition, defendant states that although the DOL knew that it (the defendant) had required its workers to pay their own transportation costs since at least 1982, the Department did not take the position that these payments violated this court's orders until March, 1986. Two weeks later the defendant requested a meeting between the parties to discuss and perhaps resolve the dispute (the meeting was held in April, 1986) but by letter of November 28, 1986 the DOL rejected defendant's offered solutions. (What those solutions were is not clear from the submissions.) The present application for contempt followed. In these circumstances, defendant argues that it tried in good faith to meet the requirements of our orders and should not be held in contempt for what it regards as the DOL's dilatory responses to its

proposals.

It appears best to begin our discussion with some general comments about our orders and the dictates of the FLSA. As defendant rightly argues the FLSA does not generally require that employers pay the transportation costs of their employees. However, the FLSA prohibits employers from including, in the wages paid to their employees, the cost of transportation or other "facilities" provided to the employees when those facilities are provided "for the benefit or convenience of the employer." 29 C.F.R. sect. 531.3(d)(1). In particular 29 C.F.R. sect. 531.32(c), promulgated to implement the provisions of the FLSA, provides:

> the cost of furnishing "facilities" which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. Items . . . which have been held to be primarily for the benefit

> of the employer . . . include . . . transportation charges where such transportation is an incident of and necessary to the employment . . .

In our 1979 grant of summary judgment as to liability we found, relying on the Wage and Hour Administration's Opinion Letter #1139 (WH-92) (December 10, 1970), that the costs of transportation from the point of recruitment to the point of hire (Puerto Rico to New Jersey) was part of the employer's recruitment cost and thus could not be considered part of the employee's wage.

Defendant's argument that we never forbade workers from paying their own fare misunderstands this basic finding. It is true that we did not require the defendant to reimburse the travel expenses of those workers who simply appeared at the labor camp ready to work. But as the defendant acknowledges those workers were never recruited.

Consequently, there was no recruitment cost for them; defendant never arranged transportation for these workers, who presumably came despite the lack of employer-arranged transportation. The situation of the workers the defendant now requires to pay their own bus and air fares is quite different. By the defendant's admission, these workers have been recruited. The contract itself states that the defendant "shall arrange transportation for the worker from the point of departure in Puerto Rico to the work location." Thus, the defendant continues to "furnish" transportation to the workers from Puerto Rico to New Jersey and must absorb the costs of recruitment because, as we found in 1979, those costs inure to the benefit of the employer and therefore cannot be place on the employee.

This was the gist of our finding in

August, 1983. Then, as now, defendant argued that when a worker pays his own transportation costs the FLSA, the applicable regulations, and our orders do not apply because each of those speaks of prohibiting "deductions" from wages or "set-offs" in "computing" wages to pay transportation costs. We rejected that argument in 1983 because "it substitutes artificial distinctions for a practical view of the economic realities of the worker-contractor relationship." We find now, as we did then, that when the defendant recruits employees in Puerto Rico and arranges transportation for them to the United States, the cost of that transportation must be borne by the defendant.

We find unavailing defendant's argument that our letter opinion of August, 1983 was mere dicta because we entered no order specifically and

explicitly prohibiting workers from paying their bus fare. The opinion made clear that the 1981 consent order already prohibited that practice. After quoting paragraph (2) of our order we stated,

> Regardless of when the worker pays his fare, the court thinks that the quoted portion of the consent order places the burden of that cost on the employer. (emphasis added).

Thus, the meaning of the consent order could not have been clearer, as to the bus fare.

The meaning of our orders regarding payment for air fare is not so clear. It is true that the issue of whether defendant may prohibit workers from paying their own air fare has not been squarely before this court. Still, we reject the defendant's argument that because this court has not specifically enjoined the recruited workers from paying their own air fares this petition should be dismissed. In McComb v.

Jacksonville Paper Co., 336 U.S. 187, 192 (1949), the Supreme Court flatly rejected arguments quite similar to that defendant asserts. There defendant had been enjoined, under the FLSa, from failing to pay its employees less than the minimum wage, from failing to pay time and a half for overtime, and from failing to keep records of its employees' hours. On the contempt application defendant asserted that it could not be held in contempt because its actions had not violated the letter of the court's order and thus could not be deemed "willful." The Supreme Court held that prosecution for contempt did not require a showing of wilfulness. 336 U.S. at 191. In particular, the High Court noted that when a litigant has specifically been enjoined from violating the provisions of the FLSA he must apply to the issuing court for modification, clarification or

construction of the order if the decree is too burdensome. Failing this, the party acts at its peril. Id. at 192. As Justice Douglas stated,

> It does not lie in their mouths to say that they have an immunity from civil contempt because the plan or scheme which they adopted was not specifically enjoined. . . . They took a calculated risk when under the threat of contempt they adopted measures designed to avoid the legal consequences of the Act.

In the instant matter this court, like the court in McComb, entered an order generally barring the defendant from violating the provisions of the FLSA. See orders of December 4, 1979 and November 5, 1981 at Paragraph 1. Thus, it was the defendant's obligation to apply to the court for modification or clarification of the order when defendant found our order burdensome. This avenue was open to defendant throughout the three and a half years since we entered final judgment in this case. Certainly

defendant had plenty of indication that such an application was appropriate. By defendant's counsel's own admission, "my clients and I were stunned when the court determined (in August, 1983) that the bus fare arrangement violated paragraph two of the Consent Amendatory Order." (Jacob Affidavit at Paragraph 20). In addition, the DOL's repeated rejections of defendant's proposals (because the DOL believed the proposals violated this court's orders) might have moved defendant to seek modification or clarification. Instead, like the defendant McComb, defendant chose to put its own interpretations on our orders and on the requirements of the Act and only now, facing prosecution for contempt, urges its interpretations upon us.

Further, it is no defense to contempt to say that the DOL has been dilatory in its responses to defendant's

proposals. If defendant believed the DOL was wrong in its interpretations of our orders, it should have sought appropriate clarification. Certainly defendant had reason to do so at least one year ago when the DOL made clear its opposition to the workers bearing the costs of their transportation. More importantly, defendant was under the orders of this court to stop all violations of the FLSA. This obligation does not depend upon the DOL's timely response to defendant's proposals.

For the reasons stated above we find that the defendant has been in contempt of this court's orders from August 25, 1983, the entry of final judgment in this matter, to the present time. This court will enter an order requiring the defendant to conduct a self-audit of its records, under the supervision of the United States

Department of Labor, and compute all back minimum wages and interest on those wages due to its employees from August 25, 1983 to the present. This order will also require the defendant to stop its practice of requiring and/or permitting its recruited employees to pay their transportation costs as a direct or indirect consequence or condition of employment.

Very truly yours,

/s/ John F. Gerry, U.S.D.J.

JFG/rmk

September 8, 1987 Notice of Appeal from Decision of United States District Court for District of New Jersey dated July 23, 1987 to United States Court of Appeals for the Third Circuit

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,
Plaintiff,

vs.

GLASSBORO SERVICE ASSOCIATION, INC.
Defendant

Civil Action

File No. 78-0377

(Gerry, J.)

NOTICE OF APPEAL

TO: CLERK, U.S. DISTRICT COURT
U.S. Court House and P.O. Bldg.
Camden, New Jersey 08101

HONORABLE JOHN F. GERRY
U.S. Court House and P.O. Bldg.
Camden, New Jersey 08101

PATRICIA M. RODENHAUSEN
Regional Solicitor
U.S. Department of Labor
1515 Broadway
New York, New York 10036

SIRS: PLEASE TAKE NOTICE that Frederick A. Jacob, Esquire hereby appeals to the United States Court of Appeals for the Third Circuit from a decision dated and filed July 23, 1987 holding defendant, Glassboro Service Association, Inc., in civil contempt of Court. The Order incorporating the above decision was signed by Judge Gerry on July 23, 1987 and filed on the same date.

PLEASE TAKE FURTHER NOTICE that the applicant will rely upon the transcript of the April 30, 1987 oral argument before Judge Gerry of the States District Court of New Jersey. Copies of the transcripts of that hearing have been duly ordered by the undersigned.

PLEASE TAKE FURTHER NOTICE that request is also made for oral argument to be held concerning this appeal.

/s/ Frederick A. Jacob

February 8, 1988 Judgment Order of United States Court Appeals for the Third Circuit

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,
Plaintiff,

vs.

GLASSBORO SERVICE ASSOCIATION, INC.
Defendant.

Civil Action

File No. 78-0377

(Gerry, J.)

ORDER

WHEREAS on December 4, 1979, this Court signed an Order granting partial summary judgment permanently enjoining defendant from violating sections 6 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended, 29 USC 201 et seq, (F.L.S.A.);

WHEREAS on November 4, 1981, this Court signed a Consent Amendatory Order amending and further refining its previous Order granting partial summary

judgment permanently enjoining defendant from violating the FLSA;

WHEREAS on August 25, 1983, this Court signed a Letter Opinion clarifying in all aspects its prior Judgment and Order permanently enjoining defendant from violating the FLSA;

WHEREAS this proceeding having come before the court on Plaintiff's Motion to Hold defendant in Civil Contempt, the court being fully advised of the issues and having rendered its decision herein following oral argument on April 30, 1987;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant is in civil contempt of the Judgment, Order and Letter Opinion previously entered in this matter; and it is further

ORDERED, ADJUDGED AND DECREED that defendant shall have five (5) days from the date of this Order to purge itself of

its contempt of this Court's prior Judgment, Order and Letter Opinion by ensuring that all employees receive the appropriate minimum wage under the FLSA and that recruited employees are neither required nor permitted to pay either their air fare or bus fare as a direct or indirect consequence or condition of employment to the extent such transportation payments would reduce their wages below the minimum wage; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff's Motion to withdraw its FLSA contempt proceeding from Bankruptcy Court to the District Court is hereby granted; and it is further

ORDERED, ADJUDGED AND DECREED that within five (5) days from the date of this Order, defendant shall conduct a self-audit of its records, under the supervision of the U.S. Department of

Labor, and compute all minimum wages due to it's employees, from August 25, 1983 to the present; and it is further

ORDERED, ADJUDGED AND DECREED that following completion of its self-audit, defendant shall provide all payroll and employment records, to plaintiff's representatives which are necessary for plaintiff to compute all post-bankruptcy petition interest due to employees found by the court to be due minimum wage compensation; and it is further

ORDERED, ADJUDGED AND DECREED that in the event defendant does not purge its contempt in the time and manner described in this Order, plaintiff may apply for an Order directing such remedial or other sanctions against defendant as may be appropriate to compel defendant to purge the aforesaid contempt.

/s/ Honorable John F. Gerry

Dated: July 23, 1987

November 22, 1983 Consent Order, United States District Court, District of New Jersey

Ann McLaughlin, Secretary of Labor, United States Department of Labor,
Plaintiff,
vs.
Glassboro Service Association, Inc.
Defendant

Civil Action File No. 78-0377

Consent Order

WHEREAS on July 23, 1987, this Court signed an Order adjudging that defendant is in civil contempt of the Judgment, Order and Letter Opinions previously entered in this matter; and

WHEREAS on November 24, 1987, the Court signed a Consent Order which Ordered, inter alia, that the defendant shall conduct an audit of the records of all workers employed by the defendant's member - growers from August 25, 1983 through the date when the defendant came into compliance with the minimum wage provisions of the Fair Labor Standards

Act; and

WHEREAS defendant has completed and forwarded said audit to the plaintiff's attorney;

It is hereby ORDERED, ADJUDGED AND DECREED that the defendant is restrained from further withholding the following amounts of unpaid minimum wages due the employees listed in Exhibit 4A for each of the years listed.

1983	$53,832.74
1984	51,082.29
1985	59,153.60
1986	53,172.72
GRAND TOTAL	$217,241.35

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that statutory interest computed on the Post-Bankruptcy Petition principal amount will be submitted to the Court as a Supplemental Order within sixty (60) days.

SO ORDERED:

/s/JOHN F. GERRY
United States District Judge

In hereby consent to the
form and content of the above Order.

George R. Salem
Solicitor of Labor

Patricia M. Rodenhausen
Regional Solicitor

By: /s/Theodore T. Gotsch
Counsel for Employment Standards
U.S. Department of Labor
Attorneys for Plaintiff

/s/Frederick A. Jacob, Esq.
Attorney for Defendant

Supreme Court, U
FILED
MAY 9 198
JOSEPH F. SPANIO
CLERK

3)

No. 87-1934

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ANNE DORE McLAUGHLIN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Respondent

vs.

GLASSBORO SERVICE ASSOCIATION, INC.,
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX

FREDERICK A. JACOB, ESQUIRE
Attorney for Petitioner
Jacob and Robinson
600 West Main Street
P.O. Box 429
Millville, New Jersey 08332
Linda T. Pirolli, Esquire, on the
Petition

INDEX OF SUPPLEMENTAL APPENDIX

Notice of Judgment and Judgment Order 1SA - 8SA

(submitted pursuant to request of Clerk, U.S. Supreme Court, 6/8/88

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

February 8, 1988

TO: Frederick A. Jacob, Esq.

Lauriston H. Long, Esq.

NOTICE OF JUDGMENT

A Judgment-Order was entered today in case No. 87-5654 and copies are enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

Your attention is specifically directed to Chapter VIII B of the Court's Internal Operating Procedures.

B. Rehearing In Banc.

Rehearing in banc is not favored and ordinarily will not be ordered except

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) where the proceeding involves a

question of exceptional importance.

This Court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

Nor, except in rare cases, has the court granted rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

When a petition for rehearing has been filed by a party as prvided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing in banc.

J-O

Rev. 9-85

FILING TIME

A petition may be filed with 14 days after entry of judgment. No extension will be granted save for the most compelling reasons. The Petition must be received in the Clerk's office within the 14 day period.

The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. No answer to a petition for rehearing will be received unless requested by the court. Oral argument in support of the petition will not be permitted.

STATEMENT OF COUNSEL

Where the party petitioning for rehearing in banc is represented by counsel, the petition shall contain, so far as is

pertinent, the following statement of counsel:

> "I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Ccurt of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court or the Supreme Court in [citing specifically the case or cases],
>
> Or, that this appeal involves a question of exceptional importance, to-wit [set forth in one sentence]."

Counsel is reminded that sanctions may be imposed for the filing of a frivolous petition for rehearing. See Fed. R. App.

P. 46(c).

FORM

The 15 page limit allowed by the Rule shall be observed.

NUMBER OF COPIES

An original and 14 copies of a petition for rehearing before the Court in banc is required.

An original and 3 copies of a petition for rehearing before the original panel is required.

Rev. 9-85

RULE 22.1

ATTACHMENTS

Attach to each petition for rehearing a copy of the judgment, order or decision of the Court as to which rehearing is sought and any memorandum or opinion of the court stating the reasons therefor.

BILL OF COSTS (FRAP 39)

FILING TIME

A party to whom costs are allowed, who

desires taxation of costs, shall file a bill of costs within 14 days after judgment. The bill of costs must be received in the Clerk's office within the 14 day period.

FORM

Counsel desiring to have costs taxed against the unsuccessful party under Rule 39, FRAP is requested to furnish an itemized and verified statement from the printer showing the actual costs per page for reproducing the brief and appendix (if any). Proof of service of the bill of costs must be attached to the bill.

MANDATE (FRAP 41)

ISSUANCE TIME

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. A motion for stay of mandate should be promptly filed if

parties intend to file a petition for writ of certiorari to the Supreme Court of the United States.

Sally Mrvos, Clerk

Enclosures

Rev. 5/86

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5654

ANN DORE McLAUGHLIN, Secretary of Labor,
United States Department of Labor

vs.

GLASSBORO SERVICE ASSOCIATION, INC.

Appellant

Appeal from the United States District
Court for the District of
New Jersey - Camden
(D.C. Civil No. 78-0377)
District Judge: Honorable John F. Gerry

JUDGMENT ORDER

After consideration of all contentions raises by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

February 8, 1988 BY THE COURT,
/s/ Carol Los Mansmann
Circuit Judge

Attest:
/s/ Sally Mrvos, Clerk

Supreme Court, U.S.
FILED
JUL 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 87-1934

In the Supreme Court of the United States

OCTOBER TERM, 1988

GLASSBORO SERVICE ASSOCIATION, INC., PETITIONER

v.

ANN DORE MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

GEORGE R. SALEM
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

TABLE OF CONTENTS

	Page
Appendix A	1a
Appendix B	3a

TABLE OF AUTHORITIES

Cases:

Maggio v. *Zeitz*, 333 U.S. 56 (1948)	4
United States v. *Rylander*, 460 U.S. 752 (1983)	4

Statute and regulation:

Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. IV) 201 *et seq.*	1
29 U.S.C. 203(m)	2
29 U.S.C. 206	2
29 U.S.C. 215(a)(2)	2
29 C.F.R. 531.32(c)	2

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1934

GLASSBORO SERVICE ASSOCIATION, INC., PETITIONER

v.

ANN DORE MCLAUGHLIN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that it should not have been held in contempt for violating a district court order by requiring migrant farmworkers to pay the costs of traveling from Puerto Rico to their places of work in New Jersey. When those transportation costs are subtracted from the workers' earnings, they receive less than the federal minimum wage set forth in the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. IV) 201 *et seq.* (FLSA).

1. Petitioner is an association of New Jersey farmers that recruits Puerto Rican migrant farmworkers for its members (Pet. App. 1a). Petitioner recruits the laborers under an agreement with the Commonwealth of Puerto Rico (*id.* at 1a-2a). Petitioner arranges for the workers' transportation from the point of recruitment in Puerto Rico to the point of hire in New Jersey (*id.* at 41a, 48a), but petitioner requires the workers to pay the costs of transportation (*ibid.*). When those costs are deducted from the compensation paid to the workers, the result is

often a rate of compensation below the minimum wage required under the FLSA (29 U.S.C. 206; Pet. App. 48a).

In 1978, the Secretary of Labor brought an action against petitioner for violating the minimum wage provisions of the FLSA (29 U.S.C. 206, 215(a)(2); Pet. App. 1a). The Secretary asserted that petitioner's practice of deducting transportation costs from the workers' wages[1] constituted a violation of the Act to the extent that it reduced their pay below the statutory minimum (Pet. App. 3a). The district court agreed with the Secretary (*id.* at 7a-9a) that transportation costs which are incident to petitioner's recruitment program cannot be charged to employees if such costs result in net pay less than the minimum wage. See 29 U.S.C. 203(m); 29 C.F.R. 531.32(c). Accordingly, on December 5, 1979, the district court permanently enjoined petitioner from deducting its transportation costs from the workers' wages if such a deduction results in net pay below the minimum wage.[2] The court of appeals affirmed that injunction (639 F.2d 774 (1980)), and this Court denied a petition for a writ of certiorari (450 U.S. 1040 (1981)).

In August 1981, the Secretary filed in the district court a petition seeking to hold petitioner in civil contempt of the court's 1979 injunction (Pet. App. 43a). The Secretary had learned that petitioner was advancing transportation costs to workers and then requesting "voluntary paybacks" of those advances (*ibid.*). On November 5, 1981, with the

---

[1] At that time, it was petitioner's practice to refund the deducted transportation costs and further pay the cost of a trip back to Puerto Rico for those employees who complete their term of hire (Pet. App. 2a).

[2] A copy of the December 1979 order is included as Appendix A to this memorandum. That order was not a final judgment because it did not resolve the issue of money damages.

consent of the parties, the court entered a new injunction (1981 Injunction) that incorporated the original injunction and added provisions specifically prohibiting petitioner from seeking "voluntary paybacks" of transportation costs (*id.* at 16a-21a, 43a-44a).

The district court entered a money judgment in this case on August 25, 1983. The court ordered petitioner to pay more than $294,000 in back wages. Pet. App. 36a-38a. In an opinion supporting that judgment, the court rejected petitioner's claim that it could require employees to pay bus fare before they were assigned to a particular farm (*id.* at 25a-29a). Petitioner argued that this practice did not violate the 1981 Injunction because a worker's payment of transportation costs before he began work was not a "deduction" from wages. The court ruled that "to the extent that a worker's payment of his ground transportation reduced the amount of money he ultimately earned below the minimum wage, that payment violated the [1981 Injunction]" (*id.* at 29a). Petitioner did not appeal from the money judgment.

2. On February 11, 1987, the Secretary commenced this contempt action. The Secretary alleged that petitioner had continued to require farm laborers to pay their transportation costs in defiance of the 1981 Injunction (Pet. App. 47a). Petitioner admitted that it required workers to pay airfare from Puerto Rico and to pay the cost of ground transportation from the airport to their housing (*id.* at 47a-48a). But petitioner denied that this practice of requiring workers to pay their own airfare violated the 1981 Injunction, even though workers' net wages often dropped below the statutory minimum (*id.* at 48a).

The court found petitioner to be in civil contempt. The court squarely rejected, as it had in August 1983, petitioner's assertion that the 1981 Injunction only prohibited "deductions" from wages to pay transportation costs and

did not forbid the workers' outright payment of those expenses (*id.* at 61a). The court observed that petitioner's argument "substitutes artificial distinctions for a practical view of the economic realities" (*ibid.*). The court reiterated its finding of 1979 that petitioner must bear transportation expenses as part of its recruitment costs because those expenses primarily benefit petitioner, not the farmworkers (*id.* at 60a).

On July 23, 1987, the court entered an order holding petitioner in civil contempt and requiring petitioner to remedy its violation (Pet. App. 70a-73a). The court of appeals affirmed that order without an opinion on February 8, 1988.[3]

3. The court of appeals' decision is clearly correct and does not conflict with any decision of this Court or any other court of appeals. Thus, no further review is warranted.

Petitioner argues (Pet. 21-24) that the district court's 1981 Injunction is wrong because it forbids petitioner's practice of charging farmworkers with its transportation costs if such charges reduce the workers' wages below the statutory minimum. Thus, petitioner is challenging the contempt order solely on the ground that the underlying injunction is based on a legal error. Accordingly, petitioner's current challenge is foreclosed by " 'the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed.' " *United States* v. *Rylander*, 460 U.S. 752, 756 (1983) (quoting *Maggio* v. *Zeitz*, 333 U.S. 56, 69 (1948)).

As petitioner concedes (Pet. 22), the correctness of the underlying order was fully litigated. And petitioner is in

---

[3] Petitioner omitted the court of appeals' order from its appendix. A copy of that order is included as Appendix B to this memorandum.

no position to argue that the district court in the present contempt action has given the 1981 Injunction a new construction of which it had no prior notice. The 1981 Injunction provides that petitioner "shall not include [in] the computations of its employees' minimum wages, as the cost of furnishing facilities to its employees, the cost of transporting workers from the point of recruitment to the point of hire" (Pet. App. 18a-19a). The district court stated in its August 25, 1983 Letter Opinion that "[r]egardless of when the worker pays for his fare, the court thinks that the * * * consent order places the burden of that cost upon the employer. The decree forbids the employer from including transportation costs from the point of recruitment—here Puerto Rico—to the point of hire—the farm—as a part of the employer's minimum wage payment to the worker" (*id.* at 28a-29a). Thus, it has been clear since 1983 that petitioner's practice of requiring workers to pay their transportation costs violates the court's 1981 Injunction, and an order of contempt for a clear violation of that injunction was wholly proper.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor

JULY 1988

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 78-0377

MARSHALL, ETC.

v.

GLASSBORO SERVICE ASSOCIATION, INC.

December 5, 1979, motion for reconsideration denied February 13, 1980

Full Text of Order

GERRY, District Judge.—Plaintiff having moved for summary judgment on July 6, 1979, and defendant having opposed this motion, and a hearing having been held on this motion before the Court on October 19, 1979, partial summary judgment is hereby granted to plaintiff on the issue of liability, and it is therefore:

ORDERED, ADJUDGED AND DECREED that defendant, its member farmers, its agents, servants, employees and those persons in active concert or participation with it be and they hereby are permanently enjoined and restrained from violating the provisions of sections 6 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U.S.C. § 219), hereinafter called the Act, in any of the following manners:

(1) Defendant shall not contrary to section 6 of the Act fail to pay its employees who are engaged in commerce

or in the production of goods for commerce, or who are employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act as aforesaid, at rates less than the minimum wage prescribed therein.

(2) Defendant shall not deduct the cost of transporting workers from the point of recruitment to the point of hire from the minimum wages due its employees under the Act. Defendant shall not include in the computations of its employees' minimum wages, as the cost of furnishing facilities to its employees, the cost of transporting workers from the point of recruitment to the point of hire.

(3) Defendant shall not offset the value of the benefits provided by it pursuant to its contract with its employees in the form of housing, utilities and meals against the minimum wage required to be paid to its employees if such offset would result in the employee receiving in cash less than the minimum wage prescribed by the Act; and it is further

ORDERED, ADJUDGED AND DECREED that a hearing shall be scheduled on the issue of the extent of damages and the entitlement of specific employees thereto.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5654

ANN DORE MCLAUGHLIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

vs.

GLASSBORO SERVICE ASSOCIATION, INC., APPELLANT

Appeal from the United States District Court
for the District of New Jersey – Camden
(D.C. Civil No. 78-0377)
District Judge: Honorable John F. Gerry

Argued Feb. 2, 1988

[Filed Feb. 8, 1988]

JUDGMENT ORDER

Before: SLOVITER, STAPLETON, and MANSMANN, *Circuit Judges.*

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ CAROL LOS MANSMANN
Carol Los Mansmann
Circuit Judge

Attest:

/s/ SALLY MRVOS
Sally Mrvos, Clerk

February 8, 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 202-037/60542